

(28,742)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 787.

THE CHARLES NELSON COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

No. 34047.

THE CHARLES NELSON CO.

VS.

THE UNITED STATES.

I. *History of Proceedings.*

On January 23, 1919, the plaintiff filed its original petition herein.

On March 15, 1919, the defendant filed a demurrer to the petition.

On March 24, 1919, the demurrer was argued and submitted.

On April 21, 1919, the demurrer was ordered to the law calendar for argument before a full bench.

On December 15, 1919, the demurrer was argued and thereupon ordered that case be remanded, with leave to plaintiff to file an amended petition within thirty days.

On January 16, 1920, the plaintiff filed an amended petition.

On March 13, 1920, the defendant filed a demurrer to the amended petition.

2 On April 26, 1920, the demurrer was argued and submitted and thereupon ordered that the demurrer be overruled without prejudice.

II. *Amended Petition.*

Filed January 16, 1920.

To the Honorable Court of Claims:

The claimant, The Charles Nelson Co., a corporation, respectfully represents and states:

1. That your petitioner is and has been at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California.

2. That after due advertisement and the opening on January 3, 1917, of formal competitive bids, claimant was, on February 23, 1917, awarded a certain written contract for furnishing lumber to the United States alongside its wharf, Navy Yard, Puget Sound, State of Washington, for the naval service at said place.

3. That by the terms of said contract claimant agreed to sell 1,675,000 feet of Douglas Fir lumber to the United States, to be delivered at said wharf and in such quantities and at such times during the period ending December 31, 1917, as the supply officer might direct, at and for prices to be based on Export G list, latest edition, Pacific Inspection Bureau: a copy of

which contract and the bond therein required and executed to procure the performance thereof, marked "Exhibit A" heretofore annexed to the original petition herein is hereby made a part hereof.

4. That thereafter the aforesaid supply officer, under and in pursuance of the terms of said contract, directed claimant from time to time to deliver certain quantities and qualities of said Douglas Fir lumber to the United States at said wharf for the naval service at said place, said amounts so ordered amounting in the aggregate to the full amount of said lumber so provided for in said contract, to-wit: 1,675,000 feet, which said several orders were received and accepted by claimant; that thereafter claimant delivered to the United States the lumber so ordered in said aggregate amount of 1,675,000 —, all of which was accepted by the United States and has been fully paid for at said contract price.

5. That at the time of the making of said contract the naval service for which lumber was used by the United States at said navy yard was, and theretofore had been, chiefly the making of certain repairs on vessels and the maintenance of said yard, requiring in any period of one year an amount of lumber approximately the amount so contracted for and so delivered, accepted and paid for; that after the entrance of the United States into the present war, the United States undertook, maintained and performed at said navy yard certain new, different and additional work, including the construction of submarine chasers, the same being a new type of naval vessel requiring therefor Douglas Fir lumber in quantities and qualities greatly in excess of the previous requirements of the United States for naval service at said navy yard and that before
4 the execution of said contract no vessel of this type had been constructed by, for, or in the United States.

6. That, at the time of the making of said contract, the United States, in order to require claimant to deliver only such portion or portions of said lumber so contracted for as the aforesaid supply officer might direct, and also in order to relieve the United States from liability for failure to order the full amount of said lumber so contracted for, or to order several amounts aggregating such total amount, caused the following provisions to be incorporated in said contract, to-wit:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas Fir which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas Fir contracted for."

7. That after the aforesaid supply officer had so ordered of claimant said aggregate amount of said lumber so contracted for, to-wit, 1,675,000 feet, and claimant had accepted such order, and the aforesaid new and additional work had been so undertaken by the United

States at said navy yard, the current market value of and the demand for Douglas Fir lumber of the kinds and qualities provided for in said contract greatly increased and the requirements of said navy yard for the maintenance and operation of said new and additional work so undertaken thereat by the United States and for the construction of said new type of naval vessel at said yard, became at once and continued to be very great and urgent.

8. That, thereupon and thereafter the aforesaid supply officer, acting as such for the United States, began and continued to submit to claimant a series of demands for delivery to the United States at said navy yard of certain qualities and quantities of Douglas Fir lumber, independent of and in addition to, said orders theretofore made and accepted up to the aggregate amount of said lumber so contracted for.

9. That claimant thereupon notified the aforesaid supply officer that orders had theretofore been made by the United States under said contract, and accepted by claimant, up to the full amount of lumber so contracted for, and denied that claimant was liable under said contract to be required by the United States to accept and fill such new and additional orders, or any of them, and protested against said new and additional orders and against being required to accept and fill the same. That a written communication was sent to said supply officer in the following language, to-wit:

Refer — Contract No. 28942.

Class No. 5.

Schedule No. 473.

C. & R.

"May 21, 1917.

Supply Officer,
Navy Yard, Puget Sound.

DEAR SIR:

By referring to this contract, which calls for 1,675 M feet of lumber in sizes or grades as may be required, in amount up to but not to exceed 1,675 M feet as needed during a period ending December 31, 1917. Up to the present time, including the one scowload which we will deliver today, we have delivered against this contract approximately 950 M. We have orders which you have sent us for delivery, of approximately 1,186 M. There is due on this contract only 725 M, so that you will have to recall approximately 461 M of these orders which you have sent us, as we cannot apply them against this contract, for we cannot exceed the amount of the original contract, viz.: 1,675 M feet.

Would kindly ask you to advise us what portion of these orders which we now have unfilled on our books, that you wish to withdraw.

Yours respectfully,

CROWN LUMBER COMPANY,
By A. A. SCOTT, *Manager.*"

And said claimant further protested against being required to furnish said lumber under the terms of said contract in the following letter addressed to said supply officer, to-wit:

"June 11, 1917.

Mr. H. P. Tichenor,
Supply Officer Dept.,
Navy Yard, Puget Sound.

DEAR SIR:

In reference to your order of June 5th, No. 7 account of contract No. 28942, Schedule No. 473, amounting to approximately 85 M feet of Douglas Fir Clear Rough, we are accepting this order under protest.

Yours respectfully,

CROWN LUMBER COMPANY,
By A. A. SCOTT,
Manager."

10. That the United States, acting through its said navy yard and its supply officer aforesaid, and relying upon a portion of the provisions of said contract last above set forth, asserted and claimed that claimant was required by the terms of said contract to accept and fill any and all new and additional orders for said Douglas Fir lumber that the United States might desire to order for its use at said navy yard until December 31, 1917.

7 11. That the United States notified claimant through its said navy yard and supply officer, that its need for said lumber was immediate and urgent and that it was the intention of the United States, in case of refusal or failure by the claimant to accept and fill said orders, to purchase said lumber on the open market and charge the purchase price thereof to claimant's account, and sent to claimant a letter in the following language, to-wit:

"June 14, 1917.

"The Charles Nelson Company,
230 California Street,
San Francisco, Cal.

GENTLEMEN:

With reference to the matter of delayed and delinquent deliveries under Contract 28942, the following telegram received on June 4th from the Bureau of Supplies and Accounts, Navy Dept., Washington, D. C., is quoted for your information:

'Contract 28942 if contractor fails make delivery purchase authorized as requested.'

The above wire is in reply to a telegram from this office requesting that authority be granted for immediate purchase against your account in the open market of all lumber for the submarine chasers on which deliveries may be unsatisfactory.

A copy of this letter is being furnished Mr. A. A. Scott, of the Crown Lumber Company.

Respectfully,

H. P. TICHENOR,

By Direction of Supply Officer."

That the market value of said lumber had greatly increased and the supply thereof in the market had so far decreased that it was not possible for the United States to secure in the open market said lumber for delivery within the terms of said contract.

12. That thereafter claimant, still so denying the right of the United States to require claimant to accept and fill said new and additional orders for said lumber, and still protesting against being required so to do under the terms of said contract, by reason of and because of the immediate and urgent need of the United States for said lumber, and by reason of the declared intention of the United States to purchase said lumber on the open market and charge the purchase price thereof to claimant's account, and by reason of the fact that such action on the part of the United States would imperil and alarm the sureties on said bond and would impair and irreparably injure the financial credit and good name of claimant, and by reason of the fact that claimant was compelled to submit to such demands and to yield to such threats of the United States or assume the risk of being heavily penalized and suffer great financial damage and loss under the terms of such contract if the same were held to be valid, furnished and delivered to the United States all amounts of Douglas Fir lumber ordered of claimant by the United States for use at said navy yard of the qualities and quantities contained in all said new and additional orders made by said supply officer upon claimant, in the aggregate amount of 2,314,930 feet over and above said 1,675,000 feet provided for in said contract, all of which was accepted and retained by the United States and used in the construction of submarine chasers.

13. That a bill of particulars of said lumber so sold and delivered to the United States on said new and additional orders, marked "Exhibit B," was annexed to the original petition herein and is hereby made a part hereof.

9 That the several qualities and quantities of said lumber set forth in said bill of particulars were so ordered by the United States on the several dates noted on said bill of particulars and were so delivered on the several dates so noted.

14. That the United States asserted the right to require claimant to accept the several prices provided for in said contract for the lumber so furnished on said new and additional orders in excess of the amount provided for in said contract. The claimant refused to accept said several prices for said lumber, and demanded payment of the several market values of said items of said bill of particulars at the times of the order thereof. After claimant protested against furnishing any lumber in excess of the amount named in the contract,

to-wit, 1,675,000 feet, and after claimant had demanded payment of the market value of said additional amount of lumber so furnished and after the United States had accepted and received said lumber, said United States paid to the claimant a sum of money equal to the aggregate price of like items of lumber if furnished under said contract, which said sum claimant accepted as partial payment and has credited to the United States as partial payment of the amount due for said lumber. That the United States refused to pay claimant the difference between any of the said several contract prices and said several market values of said items of lumber, which several differences are separately noted on said bill of particulars. That the total amount of such differences between said market values and said contract prices is the sum of \$20,321.33, all of which specifically appears by said bill of particulars, which sum of \$20,321.33 is past due and unpaid.

15. That no action upon your claimant's foregoing claim has been had before Congress. That said claim was presented to the
10 Navy Department and payment thereof refused by said Department. That claimant appealed from this decision of the Navy Department to the Treasury Department. That said Treasury Department refused to authorize the payment of said claim. That no transfer or assignment of said claim, or any part thereof, or interest therein, has been made. That said claim is now owned by your claimant, and no other person or corporation is the owner thereof or is interested therein, and that your claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets; that your claimant has at all times borne true allegiance to the United States, and has not in any way voluntarily abetted or given encouragement to rebellion against said Government.

Prayers.

Wherefore, your claimant prays:

1. That the court will render a judgment against the United States in favor of your claimant for the payment by the United States to your petitioner of the said sum of Twenty Thousand Three Hundred and Twenty-one Dollars and Thirty-three Cents (\$20,321.33)
2. That your claimant may have such other and further relief as justice and the exigencies of its case may require.

THE CHARLES NELSON CO.,
By W. E. HUMPHREY,
Attorney for Claimant.

WILLIAM C. PRENTISS,
Of Counsel

11 CITY OF WASHINGTON,
District of Columbia, ss:

W. E. Humphrey, being first duly sworn, says that he is the attorney of The Charles Nelson Co.; that he has authority to subscribe to and verify the foregoing amended petition from said company; that he has read said amended petition, knows the contents thereof and the facts therein stated, and that he believes the same to be true.

W. E. HUMPHREY.

Subscribed and sworn to before me this 16th day of January, A. D. 1920.

ETHEL R. GUISE,
Notary Public in and for the District of
Columbia, Residing in Washington.

My commission expires December 4, 1922.

12 "Claimant's Exhibit A."

N. S. A. 535.

Contract No. 28942. Opening January 3, 1917.

(All correspondence relative to inspection, deliveries, damages, payments, etc., hereon, must refer to the above contract number and the number of the class concerned.)

This contract of two parts, made and concluded this 23d day of Feb., 1917, A. D. 19—, by and between The Charles Nelson Co., 230 California St., of San Francisco, in the State of California, party of the first part, and the United States, by the Paymaster General, United States Navy (Chief of the Bureau of Supplies and Accounts), acting under the direction of the Secretary of the Navy, party of the second part, Witnesseth, That for and in consideration of the payments hereinafter specified, the party of the first part, for itself and its personal and legal representatives, doth hereby covenant and agree to and with the party of the second part, as follows, viz:

1. That it, the said party of the first part, will furnish and deliver, at its own risk and expense, the following classes of articles, at the place and within the time stated for each class, and at the price set opposite each item as appended hereto, respectively:

Class 5.—(Request No. 143, G. A. A., Naval Supply Account, C and R.—Puget Sound, Wash.—Sch. 473.)

To be delivered f. o. b. scow, alongside wharf, navy yard, Puget Sound, Wash., in such quantities and at such times during the period ending December 31, 1917, as the supply officer may direct.

All deliveries to be made promptly and orders of 50,000 feet b. m. or less of assorted sizes, not more than 10,000 feet b. m. of any one size, except with the consent of the contractor, must be delivered within 10 days after receipt of order.

All other orders must be delivered within 25 days after date of receipt of order from the supply officer.

If unable to make delivery within the time specified, state the actual time required. Alternate bids with a greater time for
13 delivery may be submitted and will be considered, but the right is reserved to make award on time stated above.

It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending Dec. 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for.

Class 5.—Continued.

Stock Classification No. 39.

Fir, Douglas, as follows:

1. 1,675,000 feet b. m. (about), of such sizes or grades as may be ordered — per M feet.

Price and extras to be based on Export G List, latest edition, Pacific Lumber Inspection Bureau, and bidders to enter below the reductions they will make from list prices.

Reduction for rough merchantable, per M feet.....	8.00
Reduction for edge grain, clear, per M feet.....	11.50
Reduction for clear, per M feet.....	9.50
Reduction for selects, per M feet.....	9.50
Reduction for common, per M feet off Mercht.....	9.50

Reduction of extra charges for—

Specified lengths, per M feet.....	Omit.
Fractional increase in thickness, per M feet.....	Omit.
Fractional increase in width, per M feet.....	Omit.
Surfacing one side, per M feet.....	25%
Surfacing each additional side, per M feet.....	25%
Reduction for railroad ties, per M feet.....	7.50
Reduction for ship plank, per M feet.....	7.50
Reduction for decking, per M feet.....	9.50
Reduction for flooring, per M feet.....	11.50
Reduction for rustic siding, per M feet.....	15.50
Reduction for ceiling, per M feet.....	16.50
Additional reductions which will be allowed on all items if accepted f. o. b. wharf or car at contractor's mill, per M feet.....	1.00

Estimated 45,000.00

14 Grading and measurement to be in accordance with Export G List, Pacific Lumber Inspection Bureau, and to be done by regular inspectors of the Pacific Lumber Inspection Bureau, at

the expense of the contractor. All rules in Export G List, Pacific Lumber Inspection Bureau, to apply, except paragraphs numbered 6, 7, 8 and 9 on pages 4 and 5 of above list.

The prices stated above are for scow-load lots of not less than 50,000 feet b. m.

The bid prices should be based on delivery f. o. b. scow. Should the contractor elect to make delivery f. o. b. car on gridiron, payment will be made at a price of \$0.25 per M feet b. m. in advance of the bid price.

Government to be allowed forty-eight hours free time in which to unload 50,000 feet b. m. from scow, with twenty-four hours additional free time for every additional 50,000 feet; time in excess of this to be paid for at the rate of \$15.00 per day or fraction thereof. Delivery scow to be given free berth at navy yard, and to be kept safely afloat at all times.

Seasoned lumber to be delivered when in stock.

Each dimension, length, and kind, as given in the orders placed by the supply officer, to be segregated on the scow.

Bidders must insert in the blank spaces in the above paragraphs the reduction or increase in prices they will agree to.

Initial point of shipment ———.

Address ———.

For general conditions see front page of this schedule.

It is further provided that the bidder to whom contract for this class may be awarded shall agree to make shipment of the material by American lines of transportation, not excluding such lines as have connections running outside of the United States.

No bid will be considered except from parties or representatives of firms operating mills cutting Douglas fir lumber and located within four days' transportation from the above-mentioned navy yard.

15 *General Conditions Covering All Classes of This Schedule.*

Liquidated damages for delayed delivery provided by Form A will not apply.

Lumber purchased in accordance with the specifications will, unless otherwise directed by the Bureau of Construction and Repair, be inspected at the initial point of shipment, subject to the following:

(a) On contracts or orders covering not less than 25,000 feet b. m. of lumber offered for inspection within a radius of 150 miles from navy yards where timber inspectors are located, i. e., navy yards, Charleston, S. C., Norfolk, Va., and Portsmouth, N. H.

(b) On contracts or orders covering not less than 50,000 feet b. m. of lumber offered for inspection within a radius of 500 miles from the above yards.

(c) On contracts or orders covering not less than 100,000 feet b. m. of lumber offered for inspection within a radius of 1,000 miles from the navy yards, Norfolk, Va., and Charleston, S. C.

(d) No mill inspection will be authorized on lumber offered for inspection at mills distant more than 1,000 miles from the above-mentioned yards. Such lumber will be inspected after delivery.

No mill inspection by the Government inspector will be ordered or conducted until the name of the mill and the place of shipment, together with the certified copy or order required below, have been furnished by the Bureau of Construction and Repair. Any delay caused by the failure of the contractor to furnish the Bureau of Construction and Repair these data immediately on award of contract will not be considered attributable to the Government in adjustment of the contract.

When the Government timber inspector finds at the mill of the subcontractor that the specifications furnished the mill by the contractor do not agree with the contract specifications and the certified copy of order placed with the subcontractors previously furnished the Bureau of Construction and Repair, the entire lot of
16 lumber concerned will be rejected without further inspection or handling.

A reinspection will not be undertaken at the mill except at the contractor's expense and after specific approval of the Bureau of Construction and Repair.

Bidders must state on the blank lines provided under each class the name of the mill and the place from which the material will be shipped. If the material will be supplied from stock and not specially manufactured, the exact location where the finished material is in stock must be stated.

The contractor must provide the necessary facilities and labor, so that a proper inspection may be held in the event of inspection being made by the Government before shipment.

If inspection is authorized at initial point of shipment, shipment made without authority from the Government inspector may result in return, at contractor's expense, of material to initial point of shipment for inspection.

In connection with the inspection of the material, if incorrect information is given, thereby causing one or more useless trips by the inspectors, the Government reserves the right to charge the expenses of such useless trips to the contractor, and further inspection at the mills may be denied the contractor, at the option of the Government.

If award is made under the rules of the National Hardwood Lumber Association, the inspection will be conducted by a licensed inspector of this association, the cost of inspection to be borne by the contractor and to be included in his bid.

If it is not practicable to arrange for inspection at the mill by a Government inspector under the rules of the Hardwood Manufacturers' Association, the lumber is to be shipped subject to in-

spection at point of delivery by a Government timber inspector. In case of controversy, the services of a licensed inspector of the Hardwood Manufacturers' Association will be obtained, if necessary, his final decision to be final, the cost of such inspection to be borne by the party to the contract against whom such decision is made.

17 The contractor must furnish the Bureau of Construction and Repair, Navy Department, Washington, D. C., with a certified copy of the order placed with the mill which will supply the lumber. Inspection will not be ordered until this certificate is furnished. This certified copy of order need not include the price, terms, etc., but must include the specifications under which the material is ordered.

2. It is hereby mutually and expressly covenanted and agreed by and between the parties hereto that the article or articles to be furnished or services to be performed under this contract shall conform in all respects to the requirements of the specifications hereunto annexed, which specifications, the "Instructions, Deliveries, and Conditions," printed on the proposal of the said party of the first part, shall be deemed and taken as forming a part of this contract with like operation and effect as if the same were incorporated herein; and, in any case where the specifications do not explicitly provide to the contrary, all workmanship and materials entering into the manufacture or construction of any article or articles under this contract, shall be of the very best commercial quality and manufacture; and said article, articles, or services shall upon delivery or completion, be subject to inspection and examination by the officer or officers authorized by the said party of the second part to inspect and examine the same; and no article furnished or services performed under this contract shall be accepted until it or they shall have been inspected and approved by such officer or officers; and any of said articles not so approved shall be removed by the said party of the first part at its own expense, and within ten days after notification.

3. It is further covenanted and agreed, as aforesaid, that time is the essential element of this contract, and that, if the said party of the first part shall fail to make delivery of any or all the articles or materials or to perform any or all of the services herein contracted for, in conformity with the conditions and requirements of the contract, and within the time or times prescribed, the said party of the second part will be damaged thereby; and the amount of said damages is hereby affixed and agreed to in advance, as liquidated damages and not as penalty, and the said party of the second part shall make deductions from the contract price accordingly, as follows, viz:

18 For each day's delay, Sundays and holidays excepted, until satisfactory delivery or performance shall have been made, or until such time as the party of the second part may procure the same as hereinafter provided, at the rate of one-twentieth of 1 per cent of the contract price, the deductions, however, not to exceed in any case 10 per cent of the stipulated value of the articles or materials

not so delivered, or of the services not so performed; rejection of deliveries or performance not to be considered as waiving deductions: Provided, that no liquidated damages shall be deducted for such period, after the expiration of the time or times prescribed for delivery or performance, as, in the judgment of the party of the second part, shall equal the time that, either in the beginning or in the prosecution of the deliveries or services contracted for, shall have been lost on account of any cause for which the United States is responsible, or on account of strikes, riots, fire, or other disaster, delays in transit or delivery on the part of transportation companies, or any other circumstances beyond the control of the contractor, but such circumstances shall not be deemed to include delays on the part of subcontractors in furnishing materials, when such delays arise from causes other than those herein specified: And provided further, that the question whether delays are due to causes herein specified shall be determined by said party of the second part.

4. It is further covenanted and agreed that if the said party of the first part shall fail in any respect to perform the contract, the same may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover

for defaults therein or violations thereof, or the said party of the second part may purchase or procure in such manner and from such person or persons as he deems proper, paying such price therefor as may be necessary in order to procure the same, such of said articles or materials of the kind specified as near as practicable, or procure the performance of such services, as the said party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price stipulated in the contract; and the amount of such difference shall be paid by the said party of the first part to the said party of the second part on demand.

5. It is further covenanted and agreed that the said party of the first part shall indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States that may be affected by the adoption or use of the articles herein contracted for.

6. It is further covenanted and agreed that in carrying out the provisions of (the) contract no person shall be employed who is undergoing sentence of imprisonment at hard labor which has been imposed by a court of the United States, of any States, Territory, or municipality having criminal jurisdiction; that the contract is upon the express condition that no Member of or Delegate to Congress, nor any person belonging to or employed in the naval service is, or shall be, admitted to any share or part therein or to any benefit to arise therefrom except as a member of a corporation; and that any transfer of the contract, or of any interest therein, to any person or party by the said party of the first part shall annul the same, so far as the United States is concerned.

7. And this contract further witnesseth, that the United States, party of the second part, in consideration of the foregoing stipulations, do hereby covenant and agree, to and with the party of the first part, as follows, viz:

That upon the presentation of the customary bills and the proper evidence of the delivery, inspection, and acceptance of said
 20 article, articles, or services, and within ten days after such evidence shall have been filed in the Bureau of Supplies and Accounts, there shall be paid to the said The Charles Nelson Co. or to its order, by the Navy Pay Officer at Washington, D. C. (Disbursing Office), the sum of Forty-five Thousand (\$45,000.00) Dollars, or the sum found to be due under this contract: Provided, however, That no payments shall be made on any one of said classes until all the articles or services embraced in such class shall have been delivered or performed and accepted, except at the option of the party of the second part.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

(See Note.)

THE CHARLES NELSON CO. [L. s.]
 JAMES TYSON, [L. s.]

President.

S. MCGOWAN, [L. s.]

*Paymaster General, U. S. Navy, Chief of
 the Bureau of Supplies and Accounts.*

Signed and sealed in the presence of—

F. G. THORNTON,

As to Party of the First Part.

KIRK HOLMES,

As to Paymaster General, U. S. Navy.

NOTE.—Contracts and bonds signed by a firm must be duly signed in the firm name and by each member of the firm, each signature to be sealed with wax or wafer seal. Contracts signed by a corporation shall be signed with the corporate name, by an officer thereof or a duly authorized agent, and sealed with the corporate seal; evidence of authority for signature to be appended.

Bond.

Know all men by these presents, That we, The Charles Nelson Co., as principals, and Fred Linderman and Mitchell Thompson as sureties, all of —, are held and firmly bound, etc.,
 21 unto the Secretary of the Navy in the penal sum of Eleven Thousand Three Hundred Dollars, to be paid to the Secretary of the Navy, or his successors; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of Feb. A. D. 1917.

Conditions.

The conditions of the above bond are such, that if the said above-bounden The Charles Nelson Co., their heirs, executors or assigns, shall well and truly, and in a satisfactory manner, fulfill the contract hereto annexed, and deliver the articles or perform the services mentioned in the annexed schedule within the time specified, and to the satisfaction of the said Chief of the Bureau of Supplies and Accounts, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

THE CHARLES NELSON CO.	[SEAL.]
JAMES TYSON,	[SEAL.]
<i>President.</i>	
FRED LINDERMAN.	[SEAL.]
M. THOMPSON.	[SEAL.]

Signed and sealed in the presence of
L. SEGELHURST.

Justification of the Sureties.

(Must be Sworn to Before a Notary Public or Other Officer Authorized to Administer Oaths.)

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

I, Fred Linderman, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of Eleven Thousand Three Hundred Dollars over and above all my debts and liabilities; that I am not a copartner of the said The Charles Nelson Co. and that I have no contract at this time with the Bureau of Supplies and Accounts.

FRED LINDERMAN,
Surety.

Subscribed and sworn to before me this 21st day of Feb., A. D. 1917.

MARGARET S. BREMER,
*Notary Public in and for the City and
County of San Francisco, California.*

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

I, Mitchell Thompson, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of Eleven Thousand Three Hundred Dollars, over and above all my debts and liabilities; that I am not a copartner of the said The Charles Nelson

Co., and that I have no contract at this time with the Bureau of Supplies and Accounts.

MARGARET S. BREMER,
Notary Public in and for the City and
County of San Francisco, California.

Certificate.

(Must be signed by a United States officer on all cases where individuals are named as bondsmen. Unnecessary if corporate surety bond is furnished.)

I, N. S. Farley, Deputy Collector of U. S. Customs, do hereby certify that Fred Linderman and Mitchell Thompson, the sureties above named, are personally known to me by reputation, and that, to the best of my knowledge and belief, each is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

N. S. FARLEY,
Deputy Collector of Customs.

Treasury Department, United States Custom Service, Port of San Francisco, Cal. Feb. 21, 1917.

23 CLAIMANT'S EXHIBIT B.					
Date of order.	Date of shipment.	Grade.	Footage.	Differences per M bet. contract and market price.	Amount of difference.
1917.	1917.				
June 2	June 19	Common	44,004	\$3.00	\$132.01
May 26	June 21	Merchantable ..	77,515	3.00	232.55
May 26	June 21	No. 1 VG, KD			
		Flooring	25,040	6.50	162.76
May 15	June 28	Clear Decking..	1,011	4.50	4.55
		Ship Plank.....	900	2.50	2.25
		Clear S4S.....	13,493	4.50	60.72
		Clear	57,328	4.50	257.98
June 5	July 5	Clear	62,176	5.50	341.97
		No. 1 Clear			
		Ceiling KD..	25,132	12.50	314.15
May 5	July 5	Ship Plank....	490	3.50	1.72
		Clear S4S.....	4,023	3.50	22.13
		Clear	19,181	5.50	105.50
June 2	July 14	Common	133,104	4.00	532.42
May 26	July 16	Merchantable ..	106,803	4.00	427.21
May 2	Aug. 9	No. 1 VG, KD			
		Flooring	50,052	8.50	425.44
June 21	Aug. 14	Clear Decking..	890	6.50	5.79
		Select	2,602	6.50	16.91
		Clear	47,072	6.50	305.97
		Merchantable ..	1,333	4.00	5.33
Aug. 13	Oct. 8	Merchantable ..			
		Ties	125,189	4.50	568.35
		Merchantable ..	1,540	5.00	7.70

Date of order.	Date of shipment.	Grade.	Footage.	Differences per M bet. contract and market price.	Amount of difference.
1917.	1917.				
June 21	Oct. 29	Clear Decking.	2,363	8.50	20.09
		Clear S4S.....	19,377	8.50	164.70
		Merchantable .	800	5.00	4.00
		Clear	56,204	8.50	477.73
		Select	1,024	8.50	8.70
June 2	Oct. 29	Common	50,856	5.00	254.28
June 28	Oct. 31	Merchantable .	40,829	5.00	204.15
June 29	Oct. 31	Merchantable .	29,826	5.00	140.13
24					
		Clear	25,542	8.50	217.11
June 29	Nov. 12	Merchantable .	58,269	9.00	524.42
June 28	Nov. 12	Merchantable .	39,804	9.00	358.23
June 29	Nov. 19	Merchantable .	93,435	9.00	840.92
June 29	Nov. 19	Clear	4,590	11.50	52.79
Aug. 9	Nov. 26	Merchantable .	122,997	9.00	1,106.97
Aug. 9	Dec. 13	Merchantable .	87,389	9.00	786.50
Aug. 4	Dec. 13	No. 1 Clear Ceiling KD..	51,440	18.50	951.64
		Clear	1,170	11.50	13.46
June 29	Dec. 13	Clear	450	11.50	5.18
		Merchantable .	6,533	9.00	58.80
June 21	Dec. 27	Clear S4S.....	1,584	11.50	18.22
		Clear Decking.	792	11.50	9.11
		Clear	13,176	11.50	151.52
May 2	Dec. 27	Clear	52,001	11.50	598.01
Aug. 9	Dec. 28	Merchantable .	71,846	9.00	646.61
Aug. 4	Dec. 23	Clear	62,037	11.50	713.43
June 29	Dec. 28	Merchantable .	5,227	9.00	47.04
Aug. 9	Dec. 29	Merchantable .	26,602	9.00	239.42
		Merchantable S1S1E	23,936	9.00	215.42
June 29	Dec. 29	Merchantable .	7,741	9.00	69.67
Aug. 4	Dec. 29	Clear	7,020	11.50	80.73
May 2		Clear	204,497	13.50	2,760.71
June 21		Clear Decking.	20,955	13.50	282.89
		Clear	65,087	13.50	878.67
May 6		VG Clear Decking	37,000	13.50	499.50
		Merchantable .	15,596	11.00	171.56
June 29		Merchantable .	1,636	11.00	18.00
		Clear	4,418	13.50	59.64
Aug. 4		No. 1 VG, KD Flooring	50,000	15.50	775.00
		Clear	114,773	13.50	1,549.44
Aug. 9		Merchantable .	37,230	11.00	409.53
			Total ...	2,314,930 feet	\$20,321.33

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III. Argument and Submission of Case.

On October 25, 1921, this case was argued and submitted on merits by William E. Humphrey, Esq., for plaintiff, and by J. Robert Anderson, Esq., for defendant.

IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.*

Entered November 21, 1921.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is a corporation duly organized and existing under the laws of the State of California. During the period here involved it maintained intimate business relations with the Crown Lumber Company, operating a mill at Mukilteo, Washington, and the Puget Sound Mills and Timber Company, operating a mill at Port Angeles, Washington, and these relations, the foundation of which is not satisfactorily shown, were such that the plaintiff at times filled its orders by directing one of the companies named, called by it "subsidiary companies," to furnish the required materials.

A. A. Scott was a stockholder and the authorized agent of the plaintiff company and was the manager of the Crown Lumber Company.

II.

On January 3, 1917, after due advertisement, formal competitive bids were opened by the Navy Department for the furnishing and delivering of Douglas fir lumber to the United States, alongside wharf, navy yard, Puget Sound, State of Washington, in such quantities and at such times during the period ending December 31, 1917, as the supply officer might direct. Plaintiff's bid being the lowest it was accepted and plaintiff was thereupon awarded the contract.

III.

On February 23, 1917, a formal contract in writing, numbered 28942, was entered into between the plaintiff and the Navy Department represented by the Paymaster General, Chief of the Bureau of Supplies and Accounts, a copy of which contract is attached to the original petition herein as "Exhibit A" and is made a part hereof by reference. The contract was the usual form of contract used by the Navy Department for procuring needed supplies during a given period, and the plaintiff in previous years had procured, entered into, and performed similar contracts.

IV.

About the time of the execution of the contract the plaintiff company, on one of its usual order forms, directed the Crown Lumber

Company to furnish 1,675,000 feet, board measure, of Douglas fir, as the same might be ordered from time to time by the supply officer at the Puget Sound Navy Yard, and the supply officer was notified that A. A. Scott, general manager of the Crown Lumber Company, was the authorized representative of the plaintiff company in the matter of the furnishing of lumber under its contract.

Thereafter the supply officer at the navy yard from time to time transmitted orders for lumber to the Crown Lumber Company which were filled and the invoices therefor were signed by the Charles Nelson Company, by A. A. Scott, its agent.

V.

By May 21, 1917, the Crown Lumber Company had delivered approximately 950,000 feet and received and accepted orders in addition thereto for the delivery of 1,186,000 feet.

There had been some delay in deliveries by the Crown Lumber Company, of which complaint had been made to the plaintiff, in reply to which the plaintiff had reported labor trouble at the Crown Lumber Company's plant as a cause of delay and that it had directed Mr. Scott, manager of that company, "as also the Puget Sound Mills and Timber Co.," to do everything possible to expedite deliveries and asking indulgence "a little while longer."

On May 17 the commandant of the navy yard wired the plaintiff "We are withholding orders approximately 115 M feet rough dimension and 15 M feet finish fir lumber on account congestion Crown Lumber Company mill. Delivery desired by June 1st. Can you arrange to furnish this and future urgent orders under contract 28942 from other mills until such time situation at Crown Lumber Co. is relieved?" to which on the 18th plaintiff replied by wire, "Please confer with A. A. Scott, general manager Puget Sound Mills & Timber Co., Port Angeles," and on the 19th wrote, quoting these messages and stating:

"Immediately on receipt of your telegram we wired Mr. A. A. Scott, general manager of the Puget Sound Mills & Timber Co., Port Angeles, to do everything he possibly could to furnish the orders you are withholding, as also other business that he may have on his books for the department. Would be pleased to have you confer direct with Mr. Scott relative this business."

The orders referred to in the last-quoted paragraph and orders theretofore received and the quantity of lumber delivered exceeded 1,675,000 feet, and the plaintiff up to this time had made no protest against filling orders in excess of that quantity. Delays in

27 deliveries, pleas for indulgence, and means of expediting the filling of orders were the subjects of correspondence.

On May 21, 1917, the Crown Lumber Company, "by A. A. Scott, manager," wrote the supply officer at the navy yard as follows:

"Dear Sir: By referring to this contract, which calls for 1,675 M feet of lumber in sizes or grades as may be required, in amount up to but not to exceed 1,675 M feet, as needed during a period ending

Dec. 31, 1917. Up to the present time, including the one scow load which we will deliver to-day, we have delivered against this contract approximately 950 M. We have orders which you have sent us for delivery of approximately 1,186 M. There is due on this contract only 725 M, so that you will have to recall approximately 461 M of these orders which you have sent us, as we can not apply them against this contract, for we can not exceed the amount of the original contract, viz, 1,675 M feet.

"Would kindly ask you to advise us what proportion of these orders which we now have unfilled on our books that you wish to withdraw."

On May 22 the supply officer replied to this letter, quoting from plaintiff's contract the following provision:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

And saying:

"Your request, therefore, will not be complied with, inasmuch as the contractor, the Charles Nelson Company, is bound to deliver any quantity of lumber which may be ordered under this contract as per terms mentioned above.

"A copy of this letter is being furnished the contractor, the Charles Nelson Company, 230 California Street, San Francisco, with the request that the situation be relieved by removing from your hands orders covering sufficient lumber to insure prompt delivery under all orders outstanding."

When the letter of May 21st above referred to was written, Mr. Scott did not know of the provision in plaintiff's contract quoted in the letter of the supply officer of the Navy of May 22d, and he disclaims any knowledge of that provision until September 25, 1917.

On May 23, 1917, the supply officer at the navy yard wired the plaintiff that the Crown Lumber Company and the Puget Sound Mills & Timber Company had declined to fill orders for approximately three hundred thousand feet, and that "unless immediate arrangements are made to effect delivery by June tenth it will be necessary to purchase in open market against your account."

On June 2d the supply officer, addressing the Crown Lumber Company and forwarding therewith order No. 6, under contract 28942, for 287,940 feet of lumber, said:

"This order is submitted in accordance with telephone conversation of Mr. A. A. Scott, of the Puget Sound Mill and Timber Company, of Port Angeles. It is understood from Mr. Scott that the delivery conditions specified above could be complied with, but if for any reason it is not possible to make deliveries

as specified you will please notify this office by return mail in order that steps may be taken to procure the lumber in the open market."

On June 7, 1917, acknowledging this order, the Crown Lumber Company, "by A. A. Scott, vice pres. & genl. manager," said "We are accepting this order under protest, especially as to delivery date."

Order No. 7, dated June 5th, was on June 11th accepted by the Crown Lumber Co., by A. A. Scott, manager, "under protest"; order No. 8, of June 21st, was, on June 26th, over the same signature, accepted "under protest, especially as to delivery"; and order No. 9, of June 28th, was on July 2d, over the same signature, accepted "under protest, especially as to delivery."

On June 18, 1917, the plaintiff company wrote the supply officer as follows:

"Dear Sir: Contract 28942. We have for acknowledgment your letter of the 14th, in which you transmit instructions received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., in which you are instructed as follows:

"Contract 28942, if contractor fails to make delivery, purchase authorized as requested."

"May we be permitted to state that it has never been our intention or aim to fail to make delivery of your requirements as we may be committed to under the contract above quoted? Mr. A. A. Scott, our resident agent on Puget Sound, has been instructed to give your business the right of way, both at the Mukilteo and Port Angeles plants.

"Mr. H. W. Jackson, our vice president, was on the Sound recently, and he states that at both mills nothing is left undone in order to produce the lumber that you have ordered under the contract.

"By way of further explanation we might say that when we entered into this contract with your department we never dreamt that we would be expected to deliver extraordinary quantities of clear lumber of long lengths, such as planking, decking, etc., within the time limits specified in the contract. In connection with these orders we feel that we are entitled to some consideration and a little leniency. The contract itself states that we are committed to making deliveries on your orders 50 M feet per B. M. or less of assorted sizes, not more than 10 M feet B. M. of any one size except with the contractor's consent, which must be delivered within ten days after date of receipt of order, and that all other orders must be delivered within twenty-five days after date of receipt of order from the supply officer. Therefore we submit that when you order 100 M feet of decking or ship lumber of long lengths and ask us to furnish same within ten days you are requiring more of us than is specified in the written contract.

"For this special material, if you were to buy this in the open market to-day, you probably would penalize us \$10.00 per M. We feel sure that it is not the desire of your department to arbitrarily penalize us to that extent, in view of the fact that we are doing our utmost to execute your orders within the time limits.

"We feel that we are not responsible for the extraordinary conditions which have arisen since the contract was executed.

29 We are reliably informed that the War Department has canceled their contracts and is now redistributing their requirements, having in view existing conditions. We also feel that your department should interpret our engagement in the same way. We trust you will accept this communication in the spirit in which it is sent. We are not asking to be relieved of any responsibility, but rather we submit the facts with a view of enlisting your cooperation to assist us in completing our engagements."

VI.

In June, 1917, A. A. Scott, manager of the Crown Lumber Company, and H. W. Jackson, vice president of the plaintiff company, had a conference at the navy yard with the chief clerk, the supply officer, and the naval constructor of the yard.

The conference was brought about by reason of the apparent inability of the contractor to deliver lumber as rapidly as needed at the yard and for the purpose of urging action that would result in more rapid deliveries.

During this conference Mr. Scott protested against being required to deliver any more than 1,675,000 feet at the contract price. The representatives of the Government maintained that the matter was covered by the contract and no promise of any kind was made to pay more than the contract price. Large quantities of lumber were thereafter delivered on orders theretofore and thereafter placed under the contract. No protest against furnishing more than 1,675,000 feet of lumber under the contract was ever made by the plaintiff company itself or any of its officers and it does not appear that Mr. Scott was directed to make such a protest at the conference above referred to or that he was acting within his authority in so doing.

VII.

The plaintiff company furnished to the defendant on orders placed by the defendant under contract 28942, 3,688,259 feet of lumber, for which it was paid at the contract price, and it did not at the time of any payment make to the United States any protest against payment at that price, and so far as the United States was informed such payments were accepted as in full.

The amount of lumber furnished over and above 1,675,000 feet was worth at market price, delivered at the navy yard, \$18,310.21 more than the plaintiff was paid therefor at contract price.

VIII.

After the execution of the contract and as a development of the World War the Government entered upon the building of submarine chasers at this navy yard a type of vessel never before built there, and much of the lumber required of the plaintiff under its contract was used in the construction of these vessels.

IX.

To relieve to some extent the congestion at the mills of the Crown Lumber Company and the Puget Sound Mills & Timber Company, and to expedite the procurement of needed materials, the defendant canceled some orders placed under the contract and bought materials in the open market at prices above the contract price, and it at one time sent men to the plant of one of these companies to help load lumber and thus facilitate deliveries.

Conclusion of Law.

On the facts found the court concludes as matter of law that the plaintiff is not entitled to recover and that its petition ought to be dismissed with judgment against it for the cost of printing to be taxed by the clerk, and it is so ordered.

Opinion.

Downey, *Judge*, delivered the opinion of the court:

The plaintiff furnished lumber to the Puget Sound Navy Yard during 1917, for all of which it was paid at the prices named in a contract entered into between it and authorized representatives of the United States in February of that year. It seeks to recover in this action the difference between what it was paid and the alleged market value of all of said lumber in excess of 1,675,000 feet, the amount it alleges it was obligated to deliver under the contract, if in fact it was obligated at all.

The contract, which followed competitive bids after due notice, was the usual form of bureau contract for the procurement of needed supplies during a given period. The articles called for were about 1,675,000 feet of Douglas fir of such sizes or grades as might be ordered, and the contract contained the following clause:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending Dec. 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

The plaintiff first contends that this clause is void for want of mutuality in that the United States was not obligated. Such a contention is not tenable. The purpose of the contract was to procure such lumber during a given period as might be needed at a place where lumber had always been needed and where, so far as human foresight could know, lumber would be needed during the period covered by the contract. The plaintiff, with former experience under such contracts, sought by its bid the right to supply such needs, its contract secured to it such rights, and they were

enforceable thereunder. But however that may be it is certainly too late for plaintiff to raise such a question after it has furnished under the contract all which, according to its construction, it was obligated to furnish and been paid therefor at the contract price.

The question then is as to the construction of the contract and the plaintiff's obligations thereunder. It contends that its obligation was limited to the furnishing of 1,675,000 feet of lumber. The defendant contends that plaintiff's obligation was measured by the needs of the navy yard during the stated period.

31 There seems to be but little room for discussion. The plain purpose of the contract was to supply a need during the period named and not to furnish a specific quantity. The clause quoted is susceptible of no other construction. It is not attempted to show that plaintiff did not so understand it when it submitted its bid and entered into the contract. And in fact it is open to reasonable inference from the facts found that during the term of the contract the plaintiff itself at all times recognized its obligation under the contract to supply the needs of the navy yard.

It is true that Mr. Scott, who was the agent of the plaintiff and also the manager of the Crown Lumber Company, undertook to limit the liability of the plaintiff under the contract to the furnishing of 1,675,000 feet of lumber, but it is equally true, according to his own testimony, that he did not then know of the provision in the contract quoted above, and it fairly appears that his position in the matter was contrary to that of his principal and entirely out of line with instructions given him.

Upon the execution of the contract the plaintiff issued to the Crown Lumber Company, some sort of a subsidiary of the plaintiff, an order to furnish the navy yard 1,675,000 feet of lumber, and this order came to Mr. Scott as the manager of the Crown Lumber Company for his attention. It is not in the record. We have not found whether it specifically limited the amount to be furnished to the quantity stated. Assume that it did. It is immaterial. It was an order by the plaintiff to one of its subsidiaries; the United States was in no sense a party and the liability of the plaintiff under its contract could not be limited thereby.

It was by letter of May 21, 1917, that Mr. Scott first undertook to limit the liability of the plaintiff to 1,675,000 feet. Deliveries made and accepted orders then on hand exceeded that amount, and he demanded the withdrawal of orders sufficient to reduce the amount to 1,675,000 feet. His attention was promptly called to the provision of the contract quoted above. With the orders sent by plaintiff to Mr. Scott as manager of the Crown Lumber Company no copy of the contract had been sent and Mr. Scott did not know of the quoted provision. It must be assumed that he was interpreting the contract liability of the plaintiff by the terms of the order issued to the Crown Lumber Company, of which he was manager. Thereafter he accepted orders, indicating in most instances that the acceptance was under protest, especially as to delivery. And delivery dates seem to have been more a subject of controversy than anything else. But, rather peculiarly, while Mr. Scott is attempting to thus limit plain-

tiff's liability, the plaintiff itself, although informed of Scott's attitude, makes no such contention, but on June 18, 1917, writes to the supply officer the letter set out in Finding V, in which it, as it seems to us, clearly repudiates Scott's position. While the position assumed by the plaintiff could not be determinative of the question of its obligation, the construction which is put upon the contract is strengthened, if in fact that was also the construction put upon it by the plaintiff.

But whether the contract obligated the plaintiff to the extent of the needs of the navy yard or only to the extent of 1,675,000 feet of lumber, the undisputed facts are that the defendant's representatives construed plaintiff's obligation as measured by the needs, irrespective of the estimated quantity stated, of which the plaintiff was fully informed, all orders were placed with direct reference to and under this contract, and the orders, except as withdrawn, were filled. If the plaintiff's obligation under its contract was in fact to furnish 1,675,000 feet of lumber and no more, it would have been entirely within its rights, having furnished that amount, to refuse to furnish more. And having furnished additional quantities in compliance with orders specifically predicated on the contract, it can not while complying with such orders create or preserve by so-called protest a right to additional compensation over and above the contract price. We have so held in the recent case of Willard, Sutherland & Co. v. United States, decided November 7, 1921.

While not cited as necessarily precluding the plaintiff, it is for consideration that payments for all this lumber at contract price were accepted without protest, so far as the defendant was informed. It is said that the plaintiff accepted these as partial payments only, but the proof goes no further than to indicate either an unexpressed mental reservation or an afterthought.

Our conclusion is necessarily against any right of recovery by the plaintiff.

Graham, Judge; Hay, Judge; and Campbell, Chief Justice, concur. Booth, Judge, dissents.

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V. Judgment of the Court.

At a Court of Claims held in the City of Washington on the Twenty-first day of November, A. D., 1921, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the Charles Nelson Company, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same is hereby dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of One Hundred and seventy-one dollars and forty-four cents (\$171.44), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Proceedings After Entry of Judgment.*

On January 9, 1922, the plaintiff filed a motion for a new trial and for modification of the findings of fact. This motion was overruled by the Court on January 16, 1922.

VII. *Plaintiff's Application for and the Allowance of an Appeal.*

Comes now the plaintiff, by its attorneys, and notes an appeal to the Supreme Court of the United States from the judgment in the above entitled cause, and showing to the court that more than \$3,000 is involved therein, prays the court to allow its said appeal and certify the record to the Supreme Court of the United States.

W. E. HUMPHREY,
WILLIAM C. PRENTISS,
Attorneys for Plaintiff.

Filed and submitted in open Court February 6, 1922.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

February 13, 1922.

34

Court of Claims.

No. 34047.

THE CHARLES NELSON CO.

VS.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law; of the opinion of the Court by Downey, J.; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this fifteenth day of February, A. D., 1922.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,742. Court of Claims. Term No. 787. The Charles Nelson Company, appellant, vs. The United States. Filed February 28th, 1922. File No. 28,742.